

NTSB Order No. EM-200

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 21st day of March, 2005

Appellant.

Docket ME-176

Appellant, by counsel, seeks review of a November 13, 2003, decision of the Commandant (acting, by delegation, through the Chief, Investigations Division) affirming Coast Guard Administrative Law Judge Walter J. Brudzinski's September 5, 2003, order denying appellant's application for a temporary license.¹ We grant the appeal.²

² Appellant's request for oral argument is denied. The

Appellant's mariner's license was revoked by the Coast Guard on July 31, 2003, after an administrative hearing before a Coast Guard law judge who upheld the charge that appellant refused to submit to a DOT-required random drug test. At the hearing, appellant vigorously disputed the charge that he refused a drug test. However, our task now, as appellant acknowledges, is not to examine the merits of his appeal of the revocation, but, rather, to review the Coast Guard's denial of his application for a temporary certificate.

Coast Guard regulations, with several exceptions not relevant here, state that any "person who has appealed from a decision suspending outright or revoking a license, certificate or document ... may file a written request for a temporary license, certificate or document."³ 46 C.F.R. § 5.707(a). The Coast Guard's "determination as to the request will take into consideration whether the service of the individual is compatible with the requirements for safety at sea and consistent with applicable laws." 46 C.F.R. § 5.707(c).⁴ Certain offenses (for which appellant was not charged) are "presumed not compatible

(..continued)

issues are adequately addressed in the written briefs.

³ Temporary licenses "provide that they expire not more than six months after issuance or upon service of the Commandant's decision on appeal, whichever occurs first." 46 C.F.R. § 5.707(d).

⁴ "If the request for a temporary document is denied by the Administrative Law Judge, the individual may appeal the denial, in writing, to the Commandant within 30 days after notification of such denial. Any decision by the Commandant to deny is the final agency action." 46 C.F.R. § 5.707(e).

with safety at sea," and a temporary license "may be denied for that reason alone."⁵ Id. Thus, inasmuch as refusal to submit to a drug test is not one of the enumerated offenses giving rise to a presumption of incompatibility with the requirements for safety at sea, "the Coast Guard must do more than state that offense to justify denial of a temporary license." Commandant v. Lyons, NTSB Order No. EM-141 (1987).

The law judge denied the request for a temporary license because he found that appellant is a "safety risk." He explained:

The law and regulations promote good discipline and safety at sea. 'Good discipline' and 'safety at sea' are not to be interpreted in the disjunctive. They go hand in hand. Failing to report for random drug testing does not promote good discipline. To restore [appellant's] license because his refusal to report for a random drug test is unrelated to 'safety at sea' would render the Coast Guard's random drug testing program useless.

September 5, 2003, Order Denying Respondent's Motions. The Commandant (through the Chief, Investigations Division) concurred with the law judge's rationale for denying the application for a temporary license, and further explained:

[t]he Commandant has held that the Congressionally mandated drug-testing regulations are designed to minimize the use

⁵ The specified offenses are: (1) assault with a dangerous weapon, (2) misconduct resulting in loss of life or serious injury, (3) rape or sexual molestation, (4) murder or attempted murder, (5) mutiny, (6) perversion, (7) sabotage, (8) smuggling of aliens, (9) incompetence, (10) interference with master, ship's officers, or government officials in performance of official duties, and (11) wrongful destruction of ship's property. 46 C.F.R. § 5.61(a).

of intoxicants by merchant mariners and to promote a drug free and safe work environment. That goal, consistent with the requirement for safety at sea, would be severely undermined if merchant mariners who have had their license revoked for failing to report for a random drug test were allowed to continue operating under a temporary license while the Commandant reviews the merits of the mariner's appeal.

November 13, 2003, Commandant Decision (by delegation to W.D. Rabe, Chief, Investigations Division).

Appellant argues that the law judge made an "erroneous factual determination that [appellant's] service is incompatible with the requirements for safety at sea, and the Commandant has erroneously upheld that determination," and also that both the law judge and the Commandant committed prejudicial error by "failing, refusing, or neglecting to receive or consider substantial evidence showing that [appellant's] service is compatible with the requirements for safety at sea." The Coast Guard has filed a reply urging us to uphold the denial of a temporary license.

Contrary to the implicit assumption in much of appellant's argument, this proceeding regarding appellant's application for a temporary license is not an opportunity to re-litigate the factual and legal issues surrounding the Coast Guard's revocation of his license. As we held in Lyons, the issue at present is whether the Coast Guard has satisfied its obligation under the Administrative Procedure Act ("APA") to explain why appellant is ineligible for a temporary license under the applicable regulatory standard. See also Commandant v. Amoury, NTSB Order

No. EM-94 (1981).

The Coast Guard regulations governing applications for temporary licenses state that any determinations upon such applications "will take into consideration whether the service of the *individual* is compatible with the requirements for safety at sea and consistent with applicable laws." 46 C.F.R. § 5.707(c) (emphasis added). Here, however, as with the explanations we found insufficient in Lyons and Amoury, the Commandant has essentially only restated the charge that appellant refused to submit to a random drug test.⁶ The Commandant erred by not providing an explanation for why appellant's particular application was denied, in the context of the applicable regulatory standards, as required by the APA.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is granted; and
2. The decision of the Commandant, affirming the law

⁶ To be sure, the Commandant explained in his policy-based decision that granting any mariner a temporary license where the underlying charge is refusal to submit to a random drug test would undermine the Coast Guard's drug program. However, this rationale would apply to all mariners charged with refusal to submit to a drug test, and, as such, his decision effectively obliterates the mariner rights embodied in the temporary license provisions. More importantly, it is clear he did not, as the regulation requires, make any determination about the particular merits of appellant's application based on the facts of his case. This, of course, is inconsistent with the facts that the Coast Guard has promulgated regulations listing those charges where precisely such a result will occur, and, most importantly, the charge against appellant is not among those listed charges. As we stated in Lyons, the Coast Guard is free to modify its regulations to list refusal to submit to drug testing as a charge where lack of qualification for a temporary license will be presumed.

judge's denial of appellant's application for a temporary license, is reversed.⁷

ROSENKER, Acting Chairman, and CARMODY, ENGLEMAN CONNERS, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.

⁷ Under normal circumstances, we would remand this case for issuance of a temporary certificate or, alternatively, a proper explanation for the denial of a temporary license. However, we were advised prior to service of this opinion that the Commandant has rendered a final decision on appellant's appeal on the merits and, under the terms of 46 C.F.R. § 5.707(d), any temporary license issued would expire upon issuance of the decision on the merits. We will process his appeal of that decision on an expedited basis. In this context, we acknowledge that because of an oversight, Board staff did not recognize the nature of appellant's appeal of the denial of a temporary certificate was tantamount to a stay proceeding, and, as such, should have been afforded priority attention. We regret that oversight. It is our policy and practice to afford expedited consideration to individuals who are serving sanctions while appeals are pending.